No. 17426

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

DANIEL ROY PEREZ,

Defendant and Appellant.

APPELLANT'S CLOSING BRIEF

Appeal From
The United States District Court For the
Southern District of California
Central Division

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Attorney for Appellant
Daniel Roy Perez.

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I

SCOPE OF THE REPLY

We have read and carefully considered the government's reply brief heretofore filed herein, and will limit this closing argument to a relatively few points, which, in our opinion, compellingly illuminate the merit in Daniel Perez' appeal, and the need for reversal herein.

1. We had urged in the opening brief that the new evidence sought to be offered went

substantively to the evidence upon which the adverse trial court finding had been made.

a. The government responded with the assertion that it was at most a cumulative effort on our part to impeach the complaining witness, Primo Lira -- relying heavily on an inquiry as to Lira's drinking which had been directed at Sophie Chavez on cross-examination.

2. We urged that the tendered evidence was of such significance that if believed by the trier of fact, it would have effectively exonerated the defendant.

a. Somewhat inconsistently, the government seemingly accepted this interpretation. On page 16 of the reply brief, the existence of this evidence is related to oil fields and characterized as a "gusher". Our friends in the oil business assure us that "gushers" are the best kind there are.

3. We urged that the interests of justice would compel that the finding of guilt be vacated and that a new trial ordered.

a. In reply to this point, the government made an extremely interesting, if curious, argument. Its counsel vigorously pointed out that the trial court, too, had had the ability to have vacated the judgment in the interests of justice, and that the mention thereof to the Court of Appeals under the circumstances was improper; that the defendant, when he cries out to this Court for justice, is "raising a new

point on appeal".

Suffice to say, we are confident that this Honorable Court of Appeals will lend an attentive and sensitive ear to a cry for justice. The very urging of such an argument, which at first blush is somewhat disconcerting, gives rise to a comforting afterthought. Perhaps counsel for the government feels that the interests of justice have been somewhat poorly served, and he therefore deems the entire approach as "dangerous ground". In all events, we noted with some satisfaction the absence of any citation of authority for the proposition that the interests of justice could not be considered by the Court in this matter. We further believe that it is "dangerous ground" for appellee.

II

THE NATURE AND CHARACTER OF THE PROFFERED EVIDENCE ARE SUCH THAT THEY WOULD EXONERATE THE DEFENDANT.

The sweep and scope of the evidence proffered by the appellant herein, which the trier of fact never heard, and which we want the trier of fact to hear, is of significance in analyzing the merit of the appeal. Under common sense and under the rule of Megia v. The United States, No. 16873 (C.A. 9, 1961), the evidence in question must be such that it would, if accepted, lead to the exoneration of the defendant. In recognition of that fact, the government has in an extremely interesting

manner attempted to convert a weakness into strength by arguing that such proffered evidence is merely impeachment, and cumulative impeachment at that, apparently being cumulative upon the question asked of Sophie Chavez in cross-examination, on the theory that mere impeachment evidence is not of such force, especially if it appears to be cumulative.

We do not deny that one of the effects of this evidence is to impeach Primo Lira. His statements and those of the affiants cannot all be true. We anticipate that the trier of fact, after seeing and hearing all of the witnesses, will conclude that the affiants are telling the truth. We therefore further anticipate that he will conclude that Lira was not telling the truth, and therefor Lira will be impeached.

However, the impeachment aspects of the evidence is an added or bonus benefit only, it is not the main or chief reason for the offer thereof. The major effect of such evidence is that it serves to eliminate from the case the finding of "flight", which formed so critical a role with the Honorable trial court judge in his decision. As he observed on page 64 of the Transcript, he interpreted the evidence that Daniel Perez stopped trading with Lira after the alleged incident as "striking evidence" of flight. He used this "striking evidence" according to his own recorded statement, to form a basis of his finding of guilt in conjunction with the evidence of Lira. When the evidence of flight, deemed "striking" by the trial court judge, is eliminated, the case becomes the word of one versus that of the other. Even in a

routine civil suit such situations present basically even odds, with the result likely to turn on such matters as which has the burden of proof, who makes the better witness, etc. In a matter criminal in nature, it would seem that the defendant would have a greatly enhanced opportunity for acquittal, particularly where the particular evidence had been given such import. Where the same evidence which removed such element from the case also demonstrated that the chief complaining witness were untruthful in material elements of the case, the defendant would rightly look forward to vindication on short order, if indeed, the charges were not voluntarily dismissed with apologies.

Appellee makes attacks on the evidentiary content of portions of the affidavits which were submitted, but we contend that these attacks are of no concern to this Court. We have never contended that the affidavits, as such, compell the Court to reverse the trial court and order the defendant exonerated; we have always recognized that the affiants will have to testify; state their evidence, stand up to cross-examination, and have their evidence weighed against Lira's. In this case, the prosecutor has an advantage not usually present; he has the statements of these witnesses in detail. He knows who they are, and where they live; a situation which might cause some uneasiness but for the fact that the prosecuting officials are high minded and principled federal officers.

When this confrontation and weighing occurs, we are confident as to the result.

III

THE INTERESTS OF JUSTICE REQUIRE THAT THE PRESENTLY EXISTING JUDGMENT BE VACATED AND THAT A NEW TRIAL BE GRANTED.

The government takes sharp issue with our invocation of the interests of justice on behalf of this youthful defendant; and suggests, on page 22, that young Perez scarcely has complaint if some form of guidance or rehabilitation or even control is found necessary to curb his "delinquent behavior".

The question before the Court has been somewhat begged by the government position, if Daniel Perez acknowledged that he had been guilty of delinquent behavior, which he denies, he would scarcely have cause or reason to complain about the judgment and sentence of the trial court, which was to place him on a probation with an absolute irreducible minimum of controls and supervision until he attains the age of 21 years. Daniel Perez is taking this case up on appeal because he was found guilty when he was innocent, he has no other advantage to gain. As he stated in his affidavit, which is a portion of the Clerk's Transcript on Appeal, he has had it explained to him that if he succeeded in his appeal, obtained a new trial, and were again found guilty, he could and perhaps would receive a more severe penalty. He willingly asks this Court to permit him to trade in this "soft landing" for an opportunity to demonstrate his innocence. The defendant

submits that with all the evidence before it, the trial court would find that he is innocent, and exonerate him from the false charge. The material upon which he would rely is in the record of proceedings now before this Court.

We respectfully submit that Daniel Perez should have that opportunity to clear himself which he so earnestly desires. Megia, heretofore cited and discussed in both opening briefs, demonstrates that this Court is rightly diligent in favor of the accused found guilty on part of the evidence where all of the evidence might well exonerate him. We submit that the attempted distinction of that case by the appellee was no more than an examination of superficial differences without a distinction, and that this case is within the purview of that decision.

IV

CONCLUSION

Defendant and appellant Daniel Perez respectfully submits to this Court that he is not a juvenile delinquent, that he did not cash the Andrade social security check, that he is innocent of the charges which have been leveled against him and upon which he has been found guilty. He further submits that he has at his present command the ability to present to the trier of facts evidence which should be believed and which will be believed, and which will show that he is innocent and which will lead to his exoneration. He asks for the ability to defeat this false charge.

Respectfully submitted,

BRIAN J. KENNEDY,

Attorney for Appellant
Daniel Roy Perez.